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**Comparing Apples to Oranges: Lessons from the  
Failure of U.S. Apple Exports to Japan**

by

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# COMPARING APPLES TO ORANGES: LESSONS FROM THE FAILURE OF U.S. APPLE EXPORTS TO JAPAN

Dustin R. Klinger

*Abstract:* In 1994, the United States and Japan agreed to permit reciprocal fresh apple imports after decades of negotiations. However, U.S. apple exports to Japan were a commercial failure. Initial sales peaked in 1995, then quickly declined, and no U.S. apples have been shipped to Japan since 1997. The United States blames unfair regulations for this failure. This Comment reviews the history of the U.S.-Japan apple dispute, analyzes Japan's apple import regulations, and concludes that those regulations aggravated, but did not cause the commercial failure of U.S. apple exports to Japan. Instead, U.S. apple exports failed because of unexpected price competition from Japanese apples, insufficient marketing efforts, and consumer rejection of the only two varieties registered for export. Unless these underlying problems are also addressed, efforts to reduce Japan's regulatory restrictions on apples will not lead to successful exports.

## I. INTRODUCTION

The U.S. Government claims that unduly restrictive Japanese regulation caused the failure of U.S. apple exports to Japan.<sup>1</sup> This Comment challenges that claim, and concludes that the U.S. apple export failure was caused more by factors such as Japanese consumer rejection, price competition from Japanese apples, and insufficient marketing than by regulatory barriers. The United States has challenged Japan's administrative exclusion of U.S. apples for over twenty years.<sup>2</sup> The apple

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<sup>1</sup> U.S. Trade Representative Charlene Barshefsky and Agriculture Secretary Dan Glickman have repeatedly stated that Japan's quarantine procedures continue to unfairly exclude American apples. They sent official demands to the Minister of Agriculture, Forestry and Fisheries as well as to the Minister of International Trade and Industry, for an explanation of the variety specific quarantine standards which impede the export of U.S. apples to Japan without resolution. The United States also filed an official complaint against Japan on this matter with the World Trade Organization. *USTR Seeks Comments on Japan Food Quarantines*, 14 INT'L TRADE REP. 1765 (1997); Tim Shorrocks, *US to Investigate Japanese Barriers to Fruit Imports: Tokyo's Testing Rules are an Issue for the WTO*, J. COM., Oct. 17, 1997, at 9A; *Biekoku, Kenekisei Kyogi wo Yōkyū* [United States Demands Conference on Quarantine Procedures], Kyodo, Oct. 2, 1996; *U.S. Asks Japan for Formal Explanation for Alleged Barriers to Apple Imports*, Int'l Trade Daily (BNA), Oct. 2, 1996; *Japan Refutes U.S. Complaint on Apple Testing*, Japan Econ. Newswire, Oct. 1, 1996; *Japan, U.S. Remain Opposite on Apple Quarantine*, Japan Econ. Newswire, June 6, 1997 available in LEXIS, Asiatic Library, Allnews file.

<sup>2</sup> The apple dispute was a low profile issue until the early 1990s. William DiBenedetto, *E. coli Another Worm in Apple Talks—Outbreak Could Snarl US-Japan Negotiations*, J. COM., Nov. 6, 1996, at 1A; David Postman, *Washington to Japan: Buy Our Apples*, SEATTLE TIMES, Oct. 3, 1997, at A1.

dispute follows a common pattern of U.S. complaints that Japanese policy unfairly prevents U.S. products from being sold in Japan.<sup>3</sup>

In 1994, the United States and Japan agreed to eliminate apple import prohibitions between the two countries ("Apple Agreement").<sup>4</sup> Initial U.S. apple exports to Japan peaked in 1995, but ended when U.S. apple growers unilaterally quit exporting apples in 1997 because they were frustrated by what they considered unfair regulatory requirements.<sup>5</sup>

This Comment will first review the long history of U.S.-Japan apple trade negotiations. It will then analyze Japan's apple regulations before and after the Apple Agreement. Comparing the affect of Japan's apple regulations to other factors, this Comment argues that Japanese consumers rejected U.S. apples because of: 1) taste and quality, 2) the unexpected introduction of competitively priced domestic apples, 3) chemical and disease scares, and 4) insufficient commitment and marketing by U.S. apple exporters.

This Comment finally predicts that the WTO Dispute Panel decision ordering Japan to end variety-specific testing requirements will eventually result in decreased regulations for agricultural exports to Japan. However, this decrease in regulations will benefit growers continuing to export apples to Japan more than U.S. growers unless the true causes of the 1995-97 U.S. export failure are addressed.

## II. BACKGROUND

Relations between the United States and Japan are primarily economic and often contentious.<sup>6</sup> U.S.-Japan trade disputes date back to 1853 when Americans sailed armed ships into Japanese waters to demand trade access.<sup>7</sup> Most trade disputes between the countries have been sparked

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<sup>3</sup> Paul Blustein, *How Do They Like Them Apples: Japanese Consumers Taste U.S.-Grown Fruit, Finally*, WASH. POST, Jan. 10, 1995, at D1.

<sup>4</sup> White House Press Release, Office of the Press Secretary, *President's Statement on Export of Apples to Japan*, Aug. 23, 1994 (visited Nov. 7, 1998) <<http://www.pub.whitehouse.gov/urires/12R?url:pd://oma.eop.gov.us/1994/8/23/2.text.1>>. The Apple Agreement was not a single written document, but a mutual agreement by trade negotiators to make the regulatory changes required to allow for the reciprocal trade of apples within the sanitary and plant inspection rules of each country. THE AMERICAN CHAMBER OF COMMERCE IN JAPAN, MAKING TRADE TALKS WORK 121 (1997).

<sup>5</sup> Nigel Holloway, *Forbidden Fruit*, FAR E. ECON. REV., Aug. 8, 1996 at 50, available in 1996 WL-FEER 10569567; Brent Evans, *Imports of Apples to Japan: Washington State's Perspective—Washington Apple Commission Statement*, (visited Nov. 1, 1998) <<http://www.voicenet.co.jp/~davald/taniibrentevans.html>>; U.S. Ends Apple Exports to Japan, Jiji Press Ticker Service, Dec. 24, 1997.

<sup>6</sup> EDWIN O. REISCHAUER, THE UNITED STATES AND JAPAN 19, 335-36 (3rd ed. 1965).

<sup>7</sup> Frank K. Upham, *Introduction: Symposium on the U.S.-Japanese Trade Relationship*, 22

by American demands for market access to Japan, or by complaints of unfair competition from Japanese exports.<sup>8</sup> The apple dispute is typical of the market access type of dispute where U.S. trade negotiators push for changes in Japanese policy to facilitate a particular U.S. business interest.<sup>9</sup> Trade agreements are regularly negotiated by the United States and Japan to settle trade disputes, but most are ineffective.<sup>10</sup>

The apple dispute, like most agricultural trade disputes, is fueled as much by political as economic interests.<sup>11</sup> In terms of economic value, the apple dispute involves an insignificant part of total U.S.-Japan trade,<sup>12</sup> but the political concerns of those who represent apple growers in both countries keep the issue alive.<sup>13</sup>

Since the end of World War II, both nations have followed agriculture policies seeking to protect domestic farmers: the U.S. through export support and Japan through protection of farmers from outside competition.<sup>14</sup> These policies have created inherent and ongoing conflict.<sup>15</sup>

CORNELL INT'L L.J. 375 (1989); REISCHAUER, *supra* note 6, at 9 (describing U.S. Admiral Mathew Perry's 1853 voyage to Japan with his fleet of armored "black ships" and negotiation of an agreement to open trade relations between the U.S. and isolationist Japan).

<sup>8</sup> Upham, *supra* note 7, at 375.

<sup>9</sup> Blustein, *supra* note 3.

<sup>10</sup> Of 45 trade pacts studied, only 13 have played significant roles in opening Japanese markets. Nancey Dunne, *U.S. Trade Deals with Japan Often Fail to Achieve Aims*, FIN. TIMES, Jan. 14, 1997 at 4(1); *Only 13 of 45 Accords with Japan Succeeded in Market Access, Business Group Reports*, 14 INT'L TRADE REP. 76 (1997).

<sup>11</sup> Agriculture holds symbolic and political importance in international trade far beyond its economic value. Micheal R. Reich et al., *Agriculture, The Political Economy of Structural Change, in AMERICA VERSUS JAPAN* 151, 152-55 (Thomas K. McCraw ed., 1986). Farmers have long been the main support base for Japan's ruling Liberal Democratic Party. JON WORONOFF, JAPANESE TARGETING 109 (1992).

<sup>12</sup> The total value of U.S. apple sales to Japan over two years was US \$17 million compared to US \$200 billion in total U.S.-Japan trade per year. Ambassador Charlene Barshefsky, *The Future of U.S.-Japan Trade Relations*, 25 LAW & POL'Y INT'L BUS. 1287, 1289 (1994); Steve Wilhelm, *Apple Exports Headed for a Record, but Japan Sales Lag*, PUGET SOUND BUS. J., Nov. 29, 1996, at 4.

<sup>13</sup> John Davies, *Foley Presses Japanese to Open to U.S. Apples*, J. COM., June 1, 1993, at 4A; Richard L. Holman, *Japanese Seek to Bar U.S. Apples: Lawsuit by Farmers to Block Import of American Apples*, WALL ST. J., Oct. 27, 1994, at A 17; *Beikoku Ringo Yūnyū he, Nosuisho ga Kaikin Kettei* [MAFF Lifts Ban on U.S. Apple Imports], Kyodo News Wire, Aug. 20, 1994.

<sup>14</sup> Both nations' farmers have suffered from the structural changes of industrialization that universally decrease the relative share of national economic output from agricultural production. Reich et al., *supra* note 11 at 151. While total U.S. agricultural exports to Japan have increased, certain politically sensitive sectors such as rice and fruit have been insulated from foreign competition. Holloway, *supra* note 5 at 50. Over time, Japan's protected sectors have fallen further behind world efficiency levels and grown more dependent on government protection from outside competition. John O. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 CORNELL INT'L L.J. 403, 405 (1989); Woronoff, *supra* note 11, at 111.

<sup>15</sup> One political commentator analyzed the tension between U.S. agriculture export drives and Japanese protectionism, correctly predicting that Japan's unwillingness to permit more American agricultural imports would result in further deterioration in trade relations. James M. Lyons, *Japan's*

Without government support and protection, many Japanese farming sectors arguably could not survive against the lower prices of world market competition.<sup>16</sup> Even Japan's strongest defenders admit that agriculture is one area where Japan is not open to free trade.<sup>17</sup> Japanese farms in general, and apple orchards in particular, function on a much smaller scale than their U.S. counterparts and are far more dependant on manual labor.<sup>18</sup> The high price of agricultural land prevents Japanese apple growers from expanding their operations to the greater economies of scale enjoyed by U.S. apple growers.<sup>19</sup> The inability of Japanese farmers to expand, as well as labor intensive growing practices, make it impossible for them to compete at world market prices.<sup>20</sup> The advantage of large-scale apple production is illustrated by the fact that apple growers in the state of Washington produce twice as many apples as all of Japan with only thirty five percent more land, but less than

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*Quantitative Restrictions on the Importation of Agricultural Products*, 15 CASE W. RES. J. INT'L L. 569 (1983). U.S. farmers have actively increased exports over the past fifty years with government support. Bruce Gardner, *The Economics of U.S. Agricultural Policy*, in U.S.-JAPANESE AGRICULTURAL TRADE RELATIONS 182 (Emery N. Castle & Kenzo Hemmi eds., 1992). Japan has experienced a corresponding increase in dependence on agricultural imports (outside of protected sectors) primarily from the United States in spite of attempts to maintain food production security and self-reliance. Reich et al., *supra* note 11 at 158 (Table 5-3); see also Liane L. Heggy, *Free Trade Meets U.S. Farm Policy: Life After the Uruguay Round*, 25 L. & POL'Y INT'L BUS. 1367 (1994).

<sup>16</sup> Woronoff, *supra* note 11, at 61; Lyons *supra* note 15; see generally *How Much do Barriers to Imports Cost Japanese Consumers?*, ECONOMIST, Jan. 7, 1995, at 58.

<sup>17</sup> AKIO MORITA, MADE IN JAPAN: AKIO MORITA AND SONY 267 (1986).

<sup>18</sup> For a good description of the labor intensive methods that Japanese apples growers use, see Sheryl Wudunn, *Imports Take No Bite Out of Japan's Pampered Apples*, INT'L HERALD TRIBUNE, July 22, 1995, at News. Japanese farms average 1.1 hectares per owner farmer, compared to 157 hectares in the U.S. Reich et al., *supra* note 11 at 164. The small size of Japanese farms is due in part to post-World War II U.S. Occupation land reforms that dispersed large land holdings out to individual farmers. *Id.* Apple growers in Japan tend on average 0.51 hectares (1.3 acres), compared to an average of nearly 7 hectares (17 acres) for all U.S. apple growers, and 20 hectares (48 acres) for Washington apple growers. 1997 U.S. DEP'T. AGRIC. JAPAN ANNUAL FRESH DECIDUOUS FRUIT REP, Sept. 17, 1997[hereinafter 1997 Japan Fruit Report], at 1; Washington Apple Commission ("WAC") Homepage (visited Nov. 23, 1998) <<http://www.bestapples.com/Educational/Industry/Trivia.html>>; MAFF Homepage (visited Nov. 23, 1998) <<http://www.maff.go.jp/abst/form1/5ab/24a.html>>.

<sup>19</sup> In 1989, an average price for farmland in Japan was US \$10,000 per square meter. Kozo Yamamura, *LDP Dominance and High Land Price in Japan: A Study in Positive Political Economy*, in LAND ISSUES IN JAPAN: A POLICY FAILURE? 33, 45 (John O. Haley & Kozo Yamamura eds., 1992)[hereinafter LAND ISSUES IN JAPAN]. Land prices have generally declined since 1989. Jathon Sapsford, *The Outlook: Japanese Real Estate Has Some Bright Spots*, WALL ST. J., June 1, 1998, at A1. However, the price calculated by Professor Yamamura still illustrates the high cost of farmers have faced in Japan compared to the United States.

<sup>20</sup> One political economist calculated the impact of subsidies on agricultural land prices and concluded that the high land prices and lack of agricultural land consolidation are a result of subsidies, tax valuation and "shadow values" (prices increases because of possible sale for development) of land that encourage farmers to keep small plots. Yoshimi Kuroda, *Price-Support Programs and Land Movement in Japanese Rice Production*, in LAND ISSUES IN JAPAN, *supra* note 19.

half the work force.<sup>21</sup> At the same time, the expansion of large scale U.S. production has increased the dependence of U.S. farmers, and Washington State apple growers in particular, on export markets to prevent over-supply from decreasing prices.<sup>22</sup> These structural factors reinforce the policy tensions underlying the U.S.-Japan apple dispute.

### A. History of the U.S.-Japan Apple Dispute

The U.S.-Japan apple dispute is the oldest active trade dispute between the two countries, with official complaints dating back to 1971.<sup>23</sup> In spite of legal provisions allowing imports, U.S. apples were effectively banned by the Plant Epidemic Prevention Law, which prohibits the introduction of diseases or insects not officially, recognized as present in Japan.<sup>24</sup> To comply with the Plant Epidemic Prevention Law, U.S. apples had to be approved as free of disease and pests by the Ministry of Agriculture, Forestry and Fisheries ("MAFF").<sup>25</sup> However, the standards and procedures for testing and preventing the spread of fire blight and the codling moth (common in U.S. apples) for MAFF approval are not expressly defined in the Plant Epidemic Prevention Law.<sup>26</sup> MAFF

<sup>21</sup> Forty thousand large-scale farms in the United States grow an average of 200 to 250 million boxes of apples each year. 1995 USITC PUBLICATION No. 2875, INTERNATIONAL TRADE COMMISSION INDUSTRY & TRADE SUMMARY OF CERTAIN FRESH DECIDUOUS FRUITS 16 (1995). available in LEXIS 1995 ITC LEXIS 222. Over half of U.S. apple production is in Washington State by 3,800 growers on 73,000 hectares (172,000 acres) with 45,000 to 50,000 people employed in harvest and packing. WAC Home Page (visited Oct. 19, 1998) < [http://www.bestapples.com/CoreFacts/cf\\_2.html](http://www.bestapples.com/CoreFacts/cf_2.html) >. In contrast, 90,000 small-scale growers in Japan produce only 32 million boxes (899,000 m.t.) of apples each year on 47,000 hectares. *Golden Sour*, ECONOMIST, Sept. 11, 1993, at 63; MAFF Homepage (visited Oct. 19, 1998) <<http://www.maff.go.jp/abst/form1/5ab/24a.html>>.

<sup>22</sup> The fall 1998 apple crop faces a price collapse due to a record crop, faltering Asian markets, and increasing low end competition from China. Lynda V. Mapes, *Apple Growers Taking Huge Financial Hit*, SEATTLE TIMES, Oct. 11, 1998, at A1; Stephen H. Dunphy, *The Newsletter: A Record Apple Crop May be in the Making*, SEATTLE TIMES, May 20 1998, at B1.

<sup>23</sup> *U.S. Lodges Complaint Against Japan's Apple Import Ban*, Int'l Trade Daily (BNA), Apr. 8, 1993; Blustein *supra* note 3; DiBenedetto, *supra* note 2.

<sup>24</sup> Shokubutsu Boeki Ho [Plant Epidemic Prevention Law], Law No. 151 of 1950. The banned diseases include fire blight and the codling moth which are found in U.S. apple orchard. See Kathryn Barry Stelljes & Dennis Senft, *Fire Blight Control, Nature's Way; Biocontrol of Fire Blights*, AGRIC. RES., Jan. 1998, at 14, available in LEXIS, News Library, ASAPII file.

<sup>25</sup> For further discussion of MAFF see *infra* notes 84-89 and accompanying text.

<sup>26</sup> The requirements for approval were sequentially revealed to U.S. negotiators as each requirement was fulfilled. In March 1993, before the Apple Agreement, U.S. Ambassador to Japan Michael Armacost openly concluded that the sequentially increasing MAFF requirements for apples were not based on legitimate phytosanitary concerns, stating, "[C]ontinuation of a technical dialogue with the Ministry of Agriculture has proven to be feckless when what we are dealing with in reality is a politically driven non-tariff trade barrier." State Dep't unclassified cable 5105, Mar. 22, 1993, cited in David Johanson &

requested and received various data and information from U.S. apple growers wanting to export to Japan over the years, but by not providing final inspection procedures, MAFF effectively banned U.S. apples.<sup>27</sup> MAFF responded to U.S. complaints of stalling by reaffirming that Japan's standards and requirements were necessary health protections and that further study was required.<sup>28</sup>

While the level of official attention given to the apple dispute has vacillated over time, particularly between U.S. Presidential administrations, the Clinton Administration made the apple dispute a high priority and increased pressure on Japan to end its prohibition on U.S. apples.<sup>29</sup> Consequently, negotiations continued until August 23, 1994, when President Clinton proudly announced the opening of Japan's apple market to U.S. exports as part of a reciprocal agreement eliminating apple import prohibitions between both nations.<sup>30</sup> The Apple Agreement was hailed a combined diplomatic and business success in "getting tough" with Japan.<sup>31</sup>

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William Bryant, *Eliminating Phytosanitary Trade Barriers: The Effects of the Uruguay Round Agreement on California Agricultural Exports*, 6 S.J. AGRI. L. REV. 1, 21 (1996).

<sup>27</sup> Kyodo, *supra* note 13. U.S. apple growers felt that MAFF was intentionally creating new requests for data as a policy of delay. Washington farmers eventually referred to MAFF as the "bug of the month club." Lori Matsukawa, *Washington State Apples in Japan: Communication Plans and Strategies* 37 (1996) (unpublished M.A. thesis, University of Washington)(on file with the University of Washington Library).

<sup>28</sup> *Japan Again Refuses Demands to Open Market to U.S. Apples*, Int'l Trade Daily (BNA), Aug. 10, 1993.

<sup>29</sup> Stephen H. Dunphy, *Seattle, Apples at Center Stage in Trade Talks*, SEATTLE TIMES, Sept. 29, 1996, at F1. The Clinton administration's high level of priority on the apple issue was illustrated by President Clinton handing a basket of Washington apples to Prime Minister Hosokawa during a press conference at the Seattle APEC Conference in 1994, and the appointment of Tom Foley (former Speaker of the United States House of Representatives and U.S. Congressman from the apple growing area of Washington State) as U.S. Ambassador to Japan. Les Blumenthal, *State Businesses Applaud Foley's Appointment to Japan*, TACOMA NEWS TRIBUNE, Sept. 3, 1997, at D1; Davies, *supra* note 13; Jim Camden, *It's Official, Foley Picked as Japan Envoy*, SPOKESMAN-REV., Aug. 30, 1997, at A1; see also *Foley Presses Japanese to Open to U.S. Apples*, J. COM., June 1, 1993, at 4A.

<sup>30</sup> *Supra* note 4.

<sup>31</sup> The Clinton administration considered the Apple Agreement a positive example of its effective "get tough" policy towards Japan. Paul Blustein, *The Boost and Boast of Trade Agreements with Japan*, WASH. POST, Apr. 18, 1996, at D9. Under the "get tough" policy, U.S. negotiators demanded affirmative official Japanese action on specific products and objective result commitments to insure the introduction of U.S. imports, while threatening increased tariffs or prohibition of Japanese exports to the United States if the demands were not met. As one former Japanese Trade official noted:

Once the staffing problems were settled, however, [the Clinton Administration] came at us with surprising speed and intensity, with both Commerce Secretary Ron Brown and U.S. Trade Representative Mickey Kantor demanding hard numbers, targets, market share, indicators and the like. Their demands were so harsh that it was almost as if they didn't recognize Japan as a sovereign nation...

Younosuke Tanaka, *Beyond Rhetoric: An In-Depth Look into the Core Issues and Causes of Strained U.S.-Japan relations*, BY THE WAY, Sept.-Oct. 1993, at 38 (interviewing former Administrative Vice-Minister of

## 1. 1994 Apple Agreement

The 1994 Apple Agreement led to a change in Japanese agricultural import regulations<sup>32</sup> and forced MAFF to provide the necessary inspection standards for Red Delicious and Golden Delicious apples imported directly from the United States.<sup>33</sup> U.S. apple imports are now possible, upon MAFF inspection and approval.<sup>34</sup> MAFF used the information and inspection reports gathered from U.S. growers over the years leading up to the Apple Agreement as the basic protocol for final inspection and approval.<sup>35</sup> The MAFF protocol requires: registration of orchard areas designated to grow apples for Japan, a 500 meter separation of registered apple trees from other related fruit trees, direct MAFF officer inspection of the designated trees three times a year, extended cold treatment and fumigation with methyl bromide before shipment, and customs inspection upon arrival in Japan.<sup>36</sup>

## 2. Japanese Apple Growers Protest Against Imported Apples

Even with the protocol restrictions, Japanese apple growers actively protested against the Apple Agreement, claiming that lower priced foreign apple imports, particularly from the U.S., were a threat to their continued existence and they went so far as to file a law suit against MAFF in order to block imports.<sup>37</sup> Japanese apple growers actively opposed the entry of foreign apples, and promoted a message that imported apples endanger the health of the Japanese people and will increase plant disease.<sup>38</sup>

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International Trade and Industry Yuji Tanahashi). The Media aspects of U.S. Apple exports have been documented in great detail. Matsukawa, *supra* note 27. Apple industry representatives boasted, "The apple growers accomplished in 18 months what 23 years of trade negotiations failed to do." Jeff Bond, *Committed to the Core*, WASH. CEO, Aug. 1996, at 36, 37. But see Yoichi Funabashi, *A View From Asia (I)*, FOREIGN POL'Y, Winter 1997-1998, at 51-54 (criticizing President Clinton for pushing "managed trade" policies).

<sup>32</sup> Kyodo, *supra* note 13; see also *infra* notes 98- 83 and accompanying text.

<sup>33</sup> William DiBenedetto, *Apple Farmers Try, Try Again: Northwest Growers Hope for Japan Success*, J. COM., Sept. 20, 1996, at 3A.

<sup>34</sup> *Id.*

<sup>35</sup> Keith Collins, *National Agricultural Statistics Service: Agricultural Outlook—April 1998 Part 1*, M2 PRESSWIRE, Mar. 26, 1998, at 15.

<sup>36</sup> *Id.*

<sup>37</sup> The suit was apparently to no avail. Holman, *supra* note 13.

<sup>38</sup> *Id.*; *Japanese Apple Growers, Researchers Protest Move to Allow U.S. Apple Imports*, 11 INT'L TRADE REP. 1104 (1994); Japanese farmers publicized the use of chemicals and the long transport time needed for imported apples. Yoko Mizui, *Samples From the Kingdom of Fruit*, DAILY YOMIURI, Nov. 25, 1995, at 8.

## B. Foreign Apple Sales in Japan

In January 1995, the first U.S. apples were legally imported and sold in Japan.<sup>39</sup> Shipments were limited to Red and Golden Delicious, because U.S. apple growers had originally submitted the test data requested by MAFF only for these varieties.<sup>40</sup> Initial sales were encouraging,<sup>41</sup> and both U.S. government and apple industry officials predicted sales of US\$60 to 100 million per year.<sup>42</sup> In reality, sales fell far short of those projections, totaling US\$15 million in 1995 and just US\$1.5 million in 1996.<sup>43</sup> As of 1997, no U.S. apples were being shipped to Japan although the import protocol remains in effect.<sup>44</sup> U.S. apple growers decided to wait for negotiation of further liberalization of Japanese apple import regulations.<sup>45</sup> Another reason Washington apple growers gave up on the difficult Japanese market<sup>46</sup> was to take advantage of easier sales markets in Mexico and Asia.<sup>47</sup> However, they may again be attracted to the Japanese market

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<sup>39</sup> All of the approved and exported apples were from Washington State. 1996 U.S. DEP'T. AGRIC. REP: JAPANESE IMPORTS OF HORTICULTURE PRODUCTS FROM THE UNITED STATES NEARLY DOUBLE SINCE 1990 - Part 2 [hereinafter 1996 Japan Report] available in WESTLAW, WL 11833493.

<sup>40</sup> *U.S. Apples Move Closer to Entering the Japanese Market: Japanese Quarantine Officials Recently Approved 17 Apples Orchards Totaling Approximately 1,200 acres for Shipment to Japan*, WORLD HORTICULTURE TRADE & U.S. EXPORT OPPORTUNITIES, Oct. 1994, available in LEXIS, News Library, Iaccgn File, IAC-ACC-No: 5753240. However, some reports indicate that MAFF only requested data on the prevailing Red and Golden Delicious varieties and it was, therefore, not the U.S. growers' choice. Les Blumenthal, *APEC: Washington Apples Face Tough Road in Japan*, TACOMA NEWS TRIBUNE, Nov. 13, 1995, at B5.

<sup>41</sup> The initial consumer interest and demand were so high, that many retailers doubled the prices for U.S. apples. Craig Forman, *Japan Retailers Lift Price of U.S. Apples*, ASIAN WALL ST. J., Jan. 16, 1995, at A-p16 Col. 3; Steve Wilhelm, *Apple Exports to Japan Fall Short of Goal*, PUGET SOUND BUS. J., Mar. 31-Apr. 6, 1995, at 1.

<sup>42</sup> Lyndsay Griffiths, *Tokyo Trade Barriers Hurt Japan Too*, Reuter Business Report, Nov. 12, 1993; DiBenedetto, *supra* note 2.

<sup>43</sup> Mickey Kantor, *Remarks of United States Trade Representative Mickey Kantor at the Center for Strategic and International Studies Briefing: Upcoming Asia Pacific Economic Cooperation Summit in Osaka*, Federal News Service, Nov. 9, 1995, available in LEXIS, News Library, Fednew File; DiBenedetto *supra* note 2. In 1995, Japanese customs recorded 8,934,896 kilograms (One standard box of apples weighs 42 pounds or 20 Kilograms so approximately 490,000 boxes) of U.S. apples entering Japan. JAPAN TARIFF ASSOCIATION, JAPAN EXPORTS & IMPORTS 1995 337 (Commodity No. 0808.10-000)(1995). In 1996, only 404,292 kilograms (21,000 boxes) were recorded. JAPAN TARIFF ASSOCIATION, JAPAN EXPORTS & IMPORTS 1996 359 (Commodity No. 0808.10-000)(1996). This number conflicts with the 50,000 boxes often reported as sold in Japan in 1996. See Wilhelm *supra* note 12; Jiji, *supra* note 5.

<sup>44</sup> Collins *supra* note 35; Jiji *supra* note 5; *Japan Apple Market Is Something of a Lemon*, L.A. TIMES, Aug. 9, 1996, at D7.

<sup>45</sup> Steve Wilhelm, *Apple Growers Take Japan to WTO*, PUGET SOUND BUS. J., Nov. 28, 1997, at 3.

<sup>46</sup> See Haley, *supra* note 14, at 421 (pointing out that, "even if there were no barriers of any sort to entry, it is not at all certain that many U.S. firms would choose to enter Japan.").

<sup>47</sup> During this same time frame of 1995-1996, U.S. apple exports to other countries in Asia and

because most other Asian export markets have collapsed since 1997, prices have declined, and U.S. apple crops continue to set record volumes.<sup>48</sup>

The export of only Red and Golden Delicious proved to be a mistake because Japanese consumers clearly preferred sweeter varieties with thin, easy-to-peel skins over Red and Golden Delicious.<sup>49</sup> Restricted to those two varieties, U.S. growers were not able to export other varieties when Red and Golden Delicious sales faltered.

Other countries exporting apples to Japan gained approval for multiple varieties of apples and have fared better. South Korea has shipped a small number of apples for processing to Japan since 1971, but greatly increased shipments after 1994.<sup>50</sup> New Zealand was the only other country to gain approval and sell foreign apples in Japan before the U.S., and was subject to similar regulatory requirements as the United States.<sup>51</sup> One important difference between the regulatory approval granted to New Zealand and that granted to the U.S., is the number of varieties included. New Zealand submitted testing data, and was approved for all of their major apple varieties including Gala, Granny Smith, Fuji, Braeburn, Red Delicious, and Royal Gala.<sup>52</sup> When Japanese consumers rejected Red and Golden delicious apples in favor of sweeter varieties, New Zealand exporters were able to adjust to the market.<sup>53</sup> However, New Zealand's

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Mexico set record numbers in volume and profits, so U.S. apple growers had little incentive to develop the market in Japan and instead focused on other, more profitable export markets. Wilhelm, *supra* note 12. Five Asian nations: Taiwan, Thailand, Hong Kong, Indonesia and the Philippines each imported one million or more boxes of U.S. apples compared to Japan's 50,000. *Id.*

<sup>48</sup> Elliot Blair Smith, *California Feels Asia's Pain: Exports Fall, Tensions Rise as Crisis Waves Lash Coast*, USA TODAY, Feb. 12, 1998, at B1 (referring to Washington Apple Commission reported showing apple export declines from 1997 to 1998 as of January 31: China -77.5%, Thailand -71.3%, Malaysia -64.1%, Indonesia -63.6%, Philippines -54%, Singapore -48.5%, Taiwan -17.8%, Hong Kong -14.9%). In addition, Mexico increased the tariff on U.S. apples to 101% in September of 1997 that greatly reduced sales. Lynda V. Mapes, *The Polish is Off the Apple*, SEATTLE TIMES, Nov. 2, 1997, at J1; Mapes, *supra* note 22.

<sup>49</sup> See *infra* notes 128-130 and accompanying text.

<sup>50</sup> *Japanese Imports of U.S. Apples Fall to One-Tenth of Previous Season's Total*, Int'l Trade Daily (BNA), Apr. 25, 1996. Imports of Korean Fuji apples surged from 7 tons in 1994 to 171 tons in 1995. 1997 Japan Fruit Report, *supra* note 18.

<sup>51</sup> New Zealand first sent small, sweet, thin-skinned Royal Gala apples from New Zealand weighing about two hundred grams, which were about half the price of domestic Japanese apples. *N.Z. San Ringu Jōriku, Jiyūka Goshō No Honkaku Yunyū* [New Zealand Apples Landing, The First Actual Imports Since Trade Liberalization], Kyodo, May 17, 1994; Satoshi Isaka, *New Zealand Offers Reform Lessons: Ambassador Says Countries Can Learn From Each Other*, NIKKEI WEEKLY, Nov. 10, 1997, at 20.

<sup>52</sup> Shokubutsu Boeki Ho Shiko Kisoku [Plant Epidemic Law Enforcement Regulations] Nihon Genko Hoki Vol. 45 Section 29 Nogyo [Agriculture] at Table 2 Index No. 224.

<sup>53</sup> See *infra* notes 127-157 and accompanying text. Other nations including New Zealand, France, and Korea are now exporting small quantities to Japan. Those current exporters along with China have expressed a desire for decreased apple import regulations and increased market access to Japan. *Japan, EU*

success as an exporter of apples to Japan, has not been as strong as anticipated, due in part to the same market difficulties that defeated U.S. exports.<sup>54</sup> Apple growers from New Zealand and around the world continue to lobby for increased access to the Japanese market, often parallel to and taking advantage from U.S. diplomatic efforts.<sup>55</sup>

### III. REGULATORY ANALYSIS

To understand the United States' complaint, it is important to understand the legal meaning of regulations in Japan. MAFF acted predictably and in accordance with past practice on the apple issue, and both U.S. trade negotiators and apple exporters failed to anticipate or work through the regulatory difficulties.

#### A. *Transition from Prohibition to Regulation*

Before the Apple Agreement, the United States complained, in effect, about a lack of regulations providing for the process of apple imports. Now that specific regulations provide for apple imports, a number of general agricultural regulations also automatically apply. MAFF general regulations require approval and licensing from the Minister of Agriculture for the sale of any agricultural products in Japan.<sup>56</sup> This required licensing of new agriculture imports in effect increases regulatory control over imported products because no regulation or control was needed when the products were prohibited. This kind of liberalization of market entry with increased regulation has been termed "re-regulation" as opposed to deregulation.<sup>57</sup> Re-regulation is partially motivated by bureaucratic infighting and attempts to increase a Ministry's authority.<sup>58</sup> By listing U.S.

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*Agree on Quarantine Rules for Agricultural Produce*, DAILY YOMIURI, Aug. 13, 1997, at 14; *French Apples Penetrate Japanese Market*, AGRICULTURE EUROPE, Dec. 19, 1997; Evelyn Iritani, *China at the Core of U.S. Apple Grower's Woes*, L.A. TIMES, Oct. 19, 1997, at D1.

<sup>54</sup> Japan's imports of New Zealand apples fell from 235 tons in 1994 to 190 in 1995. *Japanese Imports of U.S. Apples Fall to One-Tenth of Previous Season's Total*, *supra* note 50; see also 1997 Japan Fruit Report, *supra* note 18.

<sup>55</sup> Barry Krissoff et al., *Barriers to Trade in Global Apple Markets*, M2 PRESSWIRE, Aug. 25, 1997, available in LEXIS, Market Library, lacnws File.

<sup>56</sup> No-sambutsu Kakaku Antei Ho [Agriculture Production Price Stabilization Law] Law No. 222 of 1953, art. 8.

<sup>57</sup> STEVEN K. VOGEL, *FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES 3* (Peter J. Katzenstein ed., 1996).

<sup>58</sup> *Id.* at 204.

apple imports as subject to approval, MAFF retains discretionary control over the approval process, as opposed to certification by objective criteria or standards.<sup>59</sup> This kind of "strategic reinforcement" is a noted pattern in Japanese regulatory reform.<sup>60</sup>

Attempts at liberalization without re-regulation in order to increase competition have been short lived in Japan, and generally undermined by bureaucratic resistance.<sup>61</sup> The lack of competition in regulated sectors coupled with the added cost of complying with Japan's complicated sales regulations are often blamed for the comparatively high retail prices faced by Japanese consumers.<sup>62</sup> U.S. officials thus argue that trade liberalization is as much to benefit Japanese consumers with lower prices as it is for U.S. exporters, but lower prices are often lost in increased regulation.<sup>63</sup>

In the case of apples, the critical mechanism of control shifted from prohibition, to inspection and discretionary approval. Even if the inspections are scientifically justified, the slow, intentional, and controlling implementation of apple import requirements amounted to a control mechanism for MAFF.<sup>64</sup> In the opinion of U.S. growers, these actions delayed the introduction of U.S. apples after the Apple Agreement, averted significant retail price competition, and limited the ability of export growers to quickly introduce new varieties to meet consumer demands.<sup>65</sup> This kind of discretionary control generally follows significant and deliberate delay in legal reform in Japan.<sup>66</sup> The pattern of strategic reinforcement was exemplified when MAFF delayed the implementation of an import inspection protocol and then helped prepare Japanese apple growers for the possible competitive effect of less expensive imports.<sup>67</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> The pattern of liberalizing, but strictly regulating, imports is "strategic" because a ministry has not liberalized for the sake of liberalization, but has selectively introduced competition in specific markets while simultaneously ensuring that domestic firms survive and prosper with as little disruption as possible. The term "reinforcement" applies when the government has not retreated from intervention, but instead has reorganized its apparatus for intervention by rearranging policies and reinforcing critical mechanisms of ministry control. *Id.* at 207.

<sup>61</sup> Emily Thornton, *Deregulation Dawdle: Japan's Reform Promises Have Produced Little Action*, FAR E. ECON. REV., Sept. 29, 1994, at 58.

<sup>62</sup> *Id.*

<sup>63</sup> Barshefsky, *supra* note 12, at 1289.

<sup>64</sup> See VOGEL, *supra* note 57, at 211.

<sup>65</sup> Evans, *supra* note 5.

<sup>66</sup> VOGEL, *supra* note 57, at 211.

<sup>67</sup> American Consulate-Sapporo Telegraph, Aug. 18, 1994, (visited Nov. 7, 1998) <<http://www.gwjapan.com/ftp/pub/business/imi/aug/im940819.m13>>. This preparation closely follows documented accounts of past liberalization practice. VOGEL, *supra* note 57, at 208.

## B. *Patterns in Japanese Trade Regulation*

Japanese trade law, structured in large part by the Allied Occupation authority in Japan after WWII, allows for bureaucratic regulation and restriction of foreign trade.<sup>68</sup> Japan's bureaucratic structure contributed to the erection of nearly impenetrable barriers against outside competitors by providing for broadly defined discretionary authority and an array of approval and licensing powers that remain in place from Occupation reforms.<sup>69</sup>

Many foreign industries have faced significant official and structural impediments to importing and selling goods in Japan, but long-term perseverance has often led to market penetration and eventual success.<sup>70</sup> However, the highest profile trade disputes such as automobiles and electronics have been "resolved" by voluntary restraints on Japanese exports after U.S. threats of retaliation, rather than by addressing Japan's regulatory barriers to U.S. imports.<sup>71</sup> Consequently, where a specific U.S. industry's interest is purely in exporting to Japan, and not limiting Japanese competition in the U.S. market, the American negotiating leverage is not as effective. Even the most successful examples of U.S. export-oriented trade agreements for citrus and beef were settled in the shadow of U.S. threats to limit Japanese industrial export access to the U.S. market.<sup>72</sup>

Like the automobile, citrus and beef disputes, the apple dispute is often used as a political rallying point in both the U.S. and Japan because of the heavily symbolic and political nature of agricultural trade issues.<sup>73</sup> The U.S. is stereo-typed as an arrogant bully demanding guaranteed market share, while Japan is characterized as a cheat, creating any excuse to keep its markets closed and internal consumer prices high.<sup>74</sup> However, the apple

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<sup>68</sup> Haley, *supra* note 14, at 406.

<sup>69</sup> *Id.* at 411.

<sup>70</sup> The struggle for success by U.S. businesses facing Japanese regulatory restrictions; including Coca-Cola, McDonalds, and IBM are well documented. See LOOK JAPAN LTD., TAKING ON JAPAN (1988); KENICHI OMAE, THE BORDERLESS WORLD 9 (1990).

<sup>71</sup> Haley, *supra* note 15, at 415, 419-20.

<sup>72</sup> Jean Heiman Grier, *The Use of Section 301 to Open Japan's Markets to Foreign Firms*, 17 N.C. J. INT'L L. & COM REG. 1 (1992); see also *infra* notes 178-183 and accompanying text.

<sup>73</sup> Upham, *supra* note 7, at 375; S. COHEN, UNEASY PARTNERSHIP: COMPETITION AND CONFLICT IN U.S.-JAPANESE TRADE RELATIONS 7 (1985); see generally *Nightline* (ABC television broadcast, Apr. 15, 1996)(Transcript # 3886: John Deutsch, Ezra Vogel, George Packard and Yoshi Tsurumi discuss adversarial images of Japan in the U.S. media).

<sup>74</sup> Reich et al., *supra* note 11, at 151; COHEN, *supra* note 73, at 2; Shotaro Yachi, *Beyond Trade Frictions—A New Horizon for U.S.-Japan Economic Relations*, 22 CORNELL INT'L L.J. 389, 392 (1989).

dispute is deeply grounded in local interests and is complicated by cultural attitudes towards the proper role of government in solving agricultural and trade problems.<sup>75</sup>

### C. *Contrasts in U.S. and Japanese Agency Function*

Administrative agencies in the U.S. and Japan take substantially different approaches to their basic functions.<sup>76</sup> Japanese bureaucracies coordinate and manage domestic interests with little direct enforcement or coercive authority, while U.S. trade and agricultural bureaucracies are expected to respond to domestic demands with decisive and legally binding policies and standards.<sup>77</sup> American negotiators in the apple dispute have asked Japan to implement American style binding regulations providing for the import of apples, while Japanese negotiators expect the American side to see how destabilizing such mandates would be for their dependence on a cooperative regulatory structure.<sup>78</sup>

MAFF is able to enforce agricultural regulations through "administrative guidance" (*gyosei shido*).<sup>79</sup> No penalty is provided for in the Plant Epidemic Prevention Law or Regulations if apples were to be imported without Ministry of Agriculture approval. It is common for Japanese regulations not to provide any penalty for violation, because there is no authorization for the agency to enforce penalties.<sup>80</sup> Administrative bodies in Japan gain voluntary cooperation through essentially non-binding directions, suggestions, requests, warnings, advice, notices, practical guidance and other acts often without any codified authority or basis of enforcement.<sup>81</sup> Informality and avoidance of objective standards contribute

<sup>75</sup> Haley, *supra* note 14, at 404.

<sup>76</sup> See John O. Haley, *Governance by Negotiations: A Reappraisal of Bureaucratic Power in Japan*, in *THE TRADE CRISIS: HOW WILL JAPAN RESPOND?* 177 (Kenneth B. Pyle ed., 1987) [hereinafter Haley, *Governance by Negotiation*].

<sup>77</sup> Haley, *supra* note 14, at 417.

<sup>78</sup> *Id.* at 416.

<sup>79</sup> Yoriaki Narita, *Gyosei Shido* [Administrative Guidance], 4 *GENDAI HO* [Contemporary Law] 131 (1966), reprinted in *THE JAPANESE LEGAL SYSTEM* 353 (Hideo Tanaka ed. & James L. Anderson trans., 1976). Japan's Administrative Procedures Act, Law No. 88 of 1993, defined administrative guidance as, "any act, not being a disposition, such as a direction, recommendation or suggestion by an administrative body, in order to ask for performance or nonperformance by a particular citizen with a view of achieving a policy aim within the sphere of competence of said administrative body." Administrative Procedures Act, Law No. 88 of 1993, translated in Lorenz Ködderitzsch, *Japan's New Administrative Procedure Law: Reason's for its Enactment and Likely Implications*, 24 *L. JAPAN* 105, 117 (1994).

<sup>80</sup> Haley, *Governance by Negotiation*, *supra* note 76, at 181.

<sup>81</sup> *Id.*

to the effectiveness of administrative guidance.<sup>82</sup> Apple importers, wholesalers, and retailers of unapproved apples could be subject to administrative guidance if the MAFF provisions were not followed.<sup>83</sup>

#### D. *Bureaucratic Competition in Japan*

Internal Japanese bureaucratic competition for influence and authority may help explain the structure of agricultural trade regulations as much as farmers' interests in avoiding competition. Agricultural import negotiations in Japan are essentially controlled by two ministries, the Ministry of Agriculture, Forestry and Fisheries ("MAFF"), discussed above, and the Ministry of International Trade and Industry ("MITI"). MAFF holds a dominant position in negotiations for agricultural imports to Japan.<sup>84</sup> If MAFF were to compromise or allow unrestricted imports, it would lose economic and political influence over its farming constituents.<sup>85</sup>

MAFF maintains influence and leverage over domestic farmers partially by protecting them from foreign competition.<sup>86</sup> The Ministry's express purpose is to promote the welfare of Japanese farmers and foster the production of agriculture.<sup>87</sup> Therefore, foreign competition disrupts MAFF authority to manage and promote domestic interests, and is contrary to the ministry's purpose.<sup>88</sup> On the other hand, discretionary regulations that allow MAFF to control the variety, volume, and timing of imported apples actually increase MAFF's ability to influence farmers and consumers by controlling the distribution of the new imports.<sup>89</sup>

MITI traditionally controls foreign trade negotiations outside of agriculture.<sup>90</sup> In contrast to MAFF, MITI is more likely to endorse the

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<sup>82</sup> FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 207 (1987).

<sup>83</sup> For example, the Agricultural Transport license required by the Agriculture Production Price Stabilization Law could be denied. *Supra* note 56.

<sup>84</sup> WORNOFF, *supra* note 11, at 29.

<sup>85</sup> *Id.*

<sup>86</sup> Haley, *Governance by Negotiation*, *supra* note 76, at 177.

<sup>87</sup> Norinsho Setchi Ho [Ministry of Agriculture, Forestry, and Fisheries Establishment Law], Law No. 153 of 1949, art. 3(1). John O. Haley, *Japan's Postwar Civil Service: The Legal Framework*, in *THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT* 75, 85 (Hyung-Ki Kim et al. eds., 1995).

<sup>88</sup> Professor Haley notes that the Japanese administrative practices of persuasion and collective agreements with industry are incompatible with U.S.-style mandatory compliance. Haley, *Governance by Negotiation*, *supra* note 77, at 190. MAFF's systematic consensual controls would be disrupted by the coercive legal regulations that American trade negotiators seek.

<sup>89</sup> Reich et al., *supra* note 11, at 184.

<sup>90</sup> CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* 75 (1982).

principle of liberalized trade and deregulation for the benefit of Japanese export industries.<sup>91</sup> This awkward overlap of ministerial authority for international trade (MITI) and agriculture issues (MAFF) has often been exploited by U.S. trade negotiators who threaten Japanese access to U.S. markets for industrial products in order to gain concessions in other sectors such as agriculture.<sup>92</sup> However, when politically expedient, even MITI will protect an industry from foreign competition and forsake the free market ideals that generally benefit Japanese industry.<sup>93</sup>

MAFF responsibility to promote and support agriculture in Japan inherently weighs against the unfettered import of agricultural products.<sup>94</sup> However, demographics indicate a near term decrease in apple farmers, the constituency motivating MAFF resistance to imports.<sup>95</sup> Although apple farmers are presently important in politically concentrated rural districts, their political and economic influence will decrease as the number of active farmers continues to decline by attrition.<sup>96</sup> In the meantime, MAFF continues to draft regulations that protect the dying industry because it is politically advantageous to support unified farmers against the giant threat of foreign apples.<sup>97</sup>

### E. *Apple Import Regulations*

As discussed above, Japanese administrative procedures generally do not parallel U.S. patterns of coercive and binding regulation. Therefore, the following textual analysis of Japanese regulations will not reveal any legally binding standards or be of use in challenging the primarily discretionary actions of MAFF. On the other hand, analysis of the relevant regulations is useful here for comparing the treatment of different agricultural products and to track the codification of the Apple Agreement.

<sup>91</sup> WORONOFF, *supra* note 11, at 29.

<sup>92</sup> Reich et al., *supra* note 11, at 182-83.

<sup>93</sup> J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* 121, 129-131 (1993) (discussing how the Ministry of International Trade and Industry drafted numerous anti-trust exemptions for the textile industry for political considerations while admitting that the industry was doomed).

<sup>94</sup> MAFF Establishment Law, Law No. 153 of 1949; *see supra* text accompanying note 87.

<sup>95</sup> One economist noted, "[The agricultural protectionism dispute] will be solved by demographic transition and the migration of young people from rural to urban areas. Most farmers today are elderly." LEON HOLLERMAN, *JAPAN, DISINCORPORATED, THE ECONOMIC LIBERALIZATION PROCESS* 45-46 (1988).

<sup>96</sup> Official MAFF statistics show that 46% of male and 39% of female farmers were aged 65 or over in 1995. MAFF, *Agriculture in Japan: Results of the 1995 Census of Agriculture* (visited Nov. 24, 1998) <[http://www.maff.go.jp/cen\\_ei.html](http://www.maff.go.jp/cen_ei.html)>.

<sup>97</sup> RAMSEYER & ROSENBLUTH, *supra* note 93.

1. *Text of the Japanese Regulatory Amendment Authorizing U.S. Apples*

On the same day that President Clinton announced the Apple Agreement, MAFF published the regulatory amendment that allows U.S. apples into Japan.<sup>98</sup> This amendment came in the form of a Ministerial Order (*Jōrei*), which added U.S. apples to a list of agricultural goods recognized by the MAFF as eligible for approval. The operative part of the amendment translated into English reads:

In Appendix to Table 1-4 plant section after "Apples that are in conformity with the standard requirements of the Minister," add, "and also Red Delicious and Golden Delicious varieties of apple originating from the United States of America, without passing through any other territory, in conformity with standard requirements and approved by the Minister."<sup>99</sup>

With MAFF's addition of U.S. apples to the allowable fruit list, U.S. apples became eligible for exemption from the Plant Epidemic Prevention Law, and thereby allowable for importation.<sup>100</sup> Significantly, the final approval for apples apparently remains at the discretion of MAFF under this regulation because they must still be "approved by the Minister." This does not mean that approval will be granted, only that it will now be considered. This amendment places no limitations on MAFF implementation or inspection procedures, and such a minimalist approach to codifying rules is consistent with Japanese administrative practice.<sup>101</sup>

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<sup>98</sup> The full text of the amendment reads:

Pursuant to the Plant Epidemic Prevention Law (Law No. 151 of 1950) Article 7 Section 1 Part 1, the Plant Epidemic Prevention Enforcement Law Regulation is hereby revised in part in accordance with the following. By order of Ogawara Taiichiro, Minister of Agriculture, Forestry and Agriculture Aug. 22, 1994. A Ministry Order amending the Plant Epidemic Prevention Law Enforcement Regulation in part. The Plant Epidemic Prevention Law Enforcement Regulation (1950 MAFF Order 73) is hereby amended in part.

Shokubutsu Boeki Ho Shiko Kisoku Ichibu Kaisei Suru [Amendment to the Plant Epidemic Law Enforcement Regulations], No. 1468-2 Jōrei [Ministerial Order] Kanpō [National Regulations] Monday Aug. 22, 1994 Ministry of Agriculture, Forestry and Fisheries Order No. 53.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Haley, *Governance by Negotiation*, *supra* note 76, at 179.

## 2. *Effects of the Amendment*

With this amendment, MAFF literally gives itself authority to allow the importation of apples meeting its own approval.<sup>102</sup> In one sense, the amendment has no affirmative meaning, because it was promulgated by the ministry itself and still requires the discretionary approval of the ministry to import the apples.<sup>103</sup> This discretion was already generally established by the Plant Epidemic Prevention Law.<sup>104</sup> On the other hand, by listing Red and Golden delicious varieties specifically, it excludes any other varieties even from consideration for approval.

Authorized by the Plant Epidemic Prevention Law,<sup>105</sup> the thrust of Plant Epidemic Law Enforcement Regulations is to prohibit any import or domestic transport of plants and agricultural products, with exceptions listed in separate tables.<sup>106</sup> These regulations also specify the pest and disease screening to be performed on imported fruit in order to prevent infestation in Japan.<sup>107</sup> In addition to import licensing, the regulation requires an agricultural transport license to distribute agricultural products, although the criteria for granting such a license again are not included in the regulation and are apparently left to MAFF discretion.<sup>108</sup> Notably, Section 14 of the regulation allows for the entry of seedling plants into Japan, including citrus, apples, and pears as long as they are in transit to other countries,<sup>109</sup> indicating less concern with risk of disease than domestic competition from the fruit products.

In addition, a special 1997 exemption allows sample products for display in museums, display gardens, or public exhibitions.<sup>110</sup> This exemption appears to have been created in response to an episode in 1993 when the Washington Apple Commission ("WAC") was denied permission to bring in apples for display at a trade show of "American Food." After being denied, WAC staged a table of empty boxes labeled "empty promises

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<sup>102</sup> Amendment, *supra* note 98.

<sup>103</sup> *Id.*

<sup>104</sup> Shokubutsu Boeki Ho [Plant Epidemic Law], Law No. 551 of 1950.

<sup>105</sup> *Id.*

<sup>106</sup> Plant Epidemic Law Enforcement Regulations, *supra* note 52, at 2662-2663. These regulations were first implemented on June 30, 1950, and have been amended nearly every year since. *Id.* at 2662.

<sup>107</sup> *Id.* ch. 2, art. 5-2 (Import Plant Testing).

<sup>108</sup> *Id.* ch. 4-2, art. 35(3). Certain kinds of products are exempt from testing, such as dried roots, scent enhancing dried goods (*Ukon*), dried macadamia nuts, almonds, cashews, cocoa, pepper, pistachios, and Persian walnuts. *Id.* ch. 2, art. 5(3).

<sup>109</sup> *Id.* ch. 2, art. 14(3).

<sup>110</sup> *Id.* ch. 2, art 6-2(1)

= empty boxes" which gained wide spread media attention in Japan and embarrassed officials at MAFF.<sup>111</sup>

The operative sections of the Plant Epidemic Prevention Regulations which affect apple exports are Sections 8 and 9 which outline procedures for plant quarantine inspectors on import, transport and packaging.<sup>112</sup> Prohibited items, containers, or packaging that are imported into Japan must have certified import approval.<sup>113</sup> Section 9 incorporates a table (*betsuhyo ni*) into the regulation by reference which lists the plants or products that are eligible for exemption by country or area.<sup>114</sup> Section 9 is the shortest provision in the regulation, but perhaps the most important to produce importers because of the table listing products which MAFF will approve for importation to Japan.<sup>115</sup> The exemption table itself is eight pages long, and is structured in two columns and three rows listing the allowable origin, plant, and any additional comments.<sup>116</sup>

The Apple Agreement, therefore, did create a regulatory change in Japan recognizing the import of Red and Golden Delicious apples, but due to the nature of regulatory function in Japan, that change does not eliminate discretion or create any concrete standards for U.S. growers to follow.

#### F. *Japanese Apples in the United States*

The other component of the Apple Agreement, namely the import of Japanese apples to the U.S., has attracted much less media attention than U.S. apples in Japan.<sup>117</sup> MAFF announced that as of August 17, 1994, the

<sup>111</sup> Evans, *supra* note 5.

<sup>112</sup> Plant Epidemic Law Enforcement Regulations *supra* note 52. ch. 2, art. 8

<sup>113</sup> *Id.* ch. 2, art. 8(1).

<sup>114</sup> *Id.* ch. 2, art. 9(1). A curious result of this grouping structure is that in sections 1, 2, 4, 5, 6, 7, 13 and Appendix 2, the Hawaiian islands often appear as a country. In section 2, the Hawaiian islands are listed in a group of primarily developing countries as eligible to send apples to Japan. This illustrates how the text of the regulation is not operative outside of MAFF discretion that alleviates internal inconsistencies in drafting.

<sup>115</sup> *Id.* ch. 2, art. 9

<sup>116</sup> The relevant section translated from Table 2-2 (emphasis added):

Origin:	2) India, Indonesia, Vietnam, Cambodia, Singapore, Sri Lanka, Thailand, Taiwan, Peoples Republic of China, Pakistan, Bangladesh, East Timor, Philippines, Brunei, Hong Kong, Malaysia, Myanmar, Laos, Papa New Guinea, <i>Hawaiian Islands</i> , Micronesia
Plant:	Citrus (varieties defined in section 10), Acerola, Avocado, . . . Grapes, Peaches, Plums, Cherry plums, Ran button, <i>Apples</i> . . .
Comment:	Excluding tangerine varieties.

<sup>117</sup> Three weeks after the arrival of U.S. apples in Japan, fifteen tons of Fuji apples from Aomori prefecture in Northwest Japan were shipped to Los Angeles to be marketed as exotic gourmet apples, but no other Japanese apple sales in the U.S. have been reported. *First Batch of Japanese Apples Leaves for U.S.*,

U.S. had taken administrative action to lift the ban on importing Japanese grown apples previously prohibited by health regulations.<sup>118</sup> The U.S. Plant Quarantine Act of 1912 authorizes the Secretary of Agriculture to issue regulations restricting the import of plant products that create a risk of injurious plant diseases or insect pests entering the United States.<sup>119</sup> Regulations relating to fruits and vegetables require importers to obtain permission to import fresh fruit into the United States, and require inspection at the port of entry.<sup>120</sup> If a particular crop in a producer country is known to be infested with pests or disease, then permission for entry is denied until an acceptable treatment protocol is established and approved by the U.S. Department of Agriculture.<sup>121</sup>

The U.S. import regulations are structured in much the same manner as their Japanese counterparts.<sup>122</sup> The fact that Japanese apples could be administratively approved for import to the U.S. pursuant to the Apple Agreement illustrates that U.S. apple import regulations are subject to political decisions as much as to scientific concerns. The U.S. regulatory action approving Japanese apples closely resembles Japan's in that ostensibly health related regulations were simply changed by political directive.<sup>123</sup>

#### IV. REASONS WHY U.S. APPLE EXPORTS TO JAPAN FAILED

Commentators and industry representatives have offered a number of inconclusive explanations for the rapid decline in U.S. apple sales in Japan after such high expectations.<sup>124</sup> In brief, the answer is consumer rejection; yet why Japanese consumers rejected the U.S. apples is not easily explained. The most prominent factors for Japanese consumer rejection of U.S. apples were the unsuitable varieties, domestic competition, testing and protocol requirements, chemical and disease scares, and insufficient marketing.<sup>125</sup> Resolving each of these issues, on top of increased retail

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BBC Summary of World Broadcasts, Jan. 16, 1995, available in LEXIS, -Asiapc Library, Bbcswb File.

<sup>118</sup> Kyodo, *supra* note 14.

<sup>119</sup> 7 U.S.C.S. §159 (1998).

<sup>120</sup> 7 C.F.R. §319.56 (1998).

<sup>121</sup> *Id.*

<sup>122</sup> *Japanese Imports of U.S. Apples Fall to One-Tenth of Previous Season's Total*, *supra* note 50.

<sup>123</sup> Exec. Order No. 12,778; 7 C.F.R. § 319 (1995); 59 Fed. Reg. 42,153 (1994); 59 Fed. Reg. 29,557 (1994).

<sup>124</sup> See *supra* notes 41-44 and accompanying text.

<sup>125</sup> William DiBenedetto, *US Warns Japan to Expand Apple Menu, WTO Complaint Hinted if Japanese Don't Bite*, J. COM., Oct. 2, 1996, at 3A.

prices of U.S. goods in Japan due to devaluation of the Yen,<sup>126</sup> will be vital if future export efforts are to avoid the same fate.

### A. *Unsuitable Varieties*

The clearest factor for Japanese consumer rejection of U.S. apples is that Red and Golden Delicious apples do not appeal to current Japanese tastes.<sup>127</sup> Red Delicious apples are also grown in Japan, but have steadily declined in popularity.<sup>128</sup> This decline indicates that consumers are rejecting all Red Delicious apples, not just imports. The Red and Golden Delicious are not sweet enough for Japanese consumers.<sup>129</sup> Japanese people have traditionally peeled and sliced a single apple into sections to share as a family after a meal; slices are then eaten with small forks or toothpicks.<sup>130</sup> This is in stark contrast to the American and European consumption of apples as snack fruit by picking them up and eating them out of hand without peeling.<sup>131</sup> Consumer rejection based on taste is not a negotiable barrier that the Japanese government can be expected to remedy.<sup>132</sup> On the other hand, U.S. growers argue that they need the chance to import other varieties to match Japanese consumer tastes.<sup>133</sup>

After the commercial failure of the small Red and Golden Delicious snack fruit, Washington growers now wish to sell varieties more acceptable to

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<sup>126</sup> Steve Wilhelm, *Soft Yen, Hard Times*, PUGET SOUND BUS. J., Feb. 14, 1997, at 1.

<sup>127</sup> Japanese consumers consistently described the U.S. Red and Golden Delicious apples as "sour" and "small." One clever farmer was quoted as saying, "I tasted the Red Delicious apples from America, but they weren't that delicious." Wudunn, *supra* note 18; Paul Blustein, *Japan Tastes U.S. Apples*, INT'L HERALD TRIBUNE, Jan. 10, 1995, at Finance.

<sup>128</sup> Domestic growers are rapidly replacing Red Delicious trees with the more popular Fuji and Jonagold varieties. 1997 DEP'T AGRIC., JAPAN: ANNUAL FY 98 MARKETING PLAN INFORMATION REP. (4), at 3-4 (July 15, 1997), available in WL 12491929 [hereinafter 1998 Marketing Plan]; (listing in a table entitled *Japanese Production of Apples by Variety* shows that production of Red Delicious declined from 22,900 to 18,200 and 15,600 metric tons between 1995, 1996 and 1997; and that Golden Delicious are also grown in Japan, but only in very minor quantities).

<sup>129</sup> Michiyo Nakamoto, *Imported Apples Fail to Grab Big Slice of Japanese Pie: Worries About Food Preservatives and Fierce Competition from Local Produce Have Taken Much of the Shine off U.S. Exporter's Hopes*, FIN. TIMES, May 16, 1996, at 4; Mark Magnier, *Japanese Market Still Strong for U.S. Growers*, J. COM., Feb. 26, 1996, at 7A; Blustein *supra* note 31.

<sup>130</sup> 1998 Marketing Plan, *supra* note 128; personal observation of the author while living with a Japanese family from 1989-1990.

<sup>131</sup> *Id.* One WAC official noted, "Getting people to bite into an apple—they just haven't done that." Blumenthal, *supra* note 40.

<sup>132</sup> Intractable issues like consumer rejection are not structural impediments that can simply be resolved by the Japanese government. Yachi *supra* note 74, at 396.

<sup>133</sup> Postman, *supra* note 2.

Japanese consumers including Fuji and Gala.<sup>134</sup> New Zealand's 1994 import approval included Granny Smith, Braeburn, and Royal Gala apples and was subject to essentially the same insect and disease prevention processes required for U.S. apples, and the U.S. seeks similar approval.<sup>135</sup> Because New Zealand submitted testing data on multiple varieties for original approval, when Japanese consumers rejected the Red Delicious apples, more of the other varieties were shipped.<sup>136</sup> U.S. growers did not yet grow substantial amounts of the non-Delicious varieties when MAFF testing began in the early 1980s, and could not have submitted them from the beginning.<sup>137</sup> There is some dispute about whether or not U.S. apple growers have conducted and submitted to Japanese authorities test data for additional varieties after the Apple Agreement.<sup>138</sup>

### B. *Chemical and Disease Scares*

An additional high profile factor in the Japanese consumer rejection of U.S. apples was a public fear of harmful chemicals.<sup>139</sup> A trace detection of a preservative not approved in Japan, Thiabendazole ("TBZ"), led Japanese customs to temporarily stop unloading of U.S. apples in the summer of 1995, leaving some shipments in port for over a month.<sup>140</sup> The Washington Apple Commission investigated and concluded that the source of the detected preservative was residue from the rollers at a single packing house, which had processed pears preserved with TBZ before packing apples bound for Japan.<sup>141</sup> Many retailers refused to stock the imported apples even after the presence of TBZ was explained and customs cleared new shipments.<sup>142</sup>

In November of 1996, an E. coli outbreak in Washington, Oregon, California, and British Columbia was traced back to unpasteurized apple cider.<sup>143</sup> This outbreak was eventually attributed to contaminants, and not

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<sup>134</sup> *Id.*

<sup>135</sup> Kyodo, *supra* note 51.

<sup>136</sup> Isaka, *supra* note 51.

<sup>137</sup> Interview with Bill Bryant, Bryant Christie Inc., International Affairs Advisor to the Northwest Fruit Growers Association, in Seattle, Wash. (Oct. 21, 1998).

<sup>138</sup> *Id.* Cf. Hiro Aida, *U.S. Criticizes Japanese Apple Testing at WTO*, Japan Econ. News Wire, Oct. 9, 1996; see also *Farm Minister Defends Testing of U.S. Apple Imports*, JAPAN WEEKLY MONITOR, Oct. 14, 1996.

<sup>139</sup> Blumenthal, *supra* note 40.

<sup>140</sup> Evans, *supra* note 5.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Federal microbiologists found a "smoking gun" in the E. coli disease outbreak: a strain of the

apples, but the news spread quickly to Japan, where an E. coli epidemic had already caused a national panic earlier in 1996.<sup>144</sup> Sales of U.S. apples dropped sharply after the E. coli reports, and Japanese trade negotiators referred to the E. coli outbreak as proof that Japan had reason to carefully test every variety of apples before allowing them into Japan.<sup>145</sup>

### C. *Insufficient Marketing*

As an attempt to create a new market rather than compete directly with the high-quality Japanese gift apples, U.S. apple marketers decided to present smaller apples as "snacks" rather than challenging the Japanese traditional market for gift or luxury apples.<sup>146</sup> This approach was in effect an attempt to change Japanese eating habits and perception of fruit. The normal cost of a Japanese-grown apple, packaged individually as a gift, is ¥400 to ¥700 or about five to six U.S. dollars.<sup>147</sup> The introductory price of U.S. apples in Japan was one-tenth the price of gift apples, but soon increased due to smaller U.S. harvests and retail mark-ups.<sup>148</sup> The lower prices attracted first time consumers, but the fall in sales shows that very few Japanese buyers were repeat customers, and very little effort was made to promote U.S. apples as anything more than a news item.<sup>149</sup>

Moreover, the commitment of U.S. apple exporters to establishing a long-term presence in the Japanese market is questionable because such limited resources were allocated to marketing. WAC spent a total of US\$100,000 for marketing and promotion of U.S. imported apples during the initial year of 1995, roughly another US\$100,000 in early 1996 but then canceled its Japan marketing budget in February of 1996.<sup>150</sup> This funding was not sufficient for a sustained nation-wide promotion effort, and brings

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bacteria in a bottle of unpasteurized Odwalla apple juice. Warren King, *E. coli Bacteria Found in Apple Juice*, SEATTLE TIMES, Nov. 5, 1996, at Local News.

<sup>144</sup> DiBenedetto, *supra* note 2.

<sup>145</sup> *Id.*

<sup>146</sup> 1998 Marketing Plan, *supra* note 128; Evans, *supra* note 5, at Sec. III.

<sup>147</sup> 1998 Marketing Plan, *supra* note 128.

<sup>148</sup> Bond, *supra* note 31.

<sup>149</sup> DiBenedetto, *supra* note 33; Matsukawa, *supra* note 27.

<sup>150</sup> This amount could not buy a single nationwide television ad in Japan. Most of the funds went to the advertising firm of Hill & Knowlton, Japan, for coordinating media coverage of U.S. apples as a political news story, without brand or product marketing. Matsukawa, *supra* note 27 at 6-10; *Growers Scale Back Ads*, COLUMBIAN, Feb. 12, 1996, at A11.

into question the apple growers' true commitment to establishing a continuing Japanese apple export market.<sup>151</sup>

Although WAC efforts successfully attracted general media coverage of the apple imports as a news item, there was no sustained marketing promotion of U.S. apples outside of gaining media attention as a political or novelty item.<sup>152</sup> The small budget is all the more questionable considering that WAC and its members were granted US\$4 million dollars in annual credits for export promotion.<sup>153</sup> In contrast to the failure of apple exports, other U.S. agricultural exports such as oranges and cherries have, after an initial period of adjustment and accommodation, profitably worked through regulatory barriers in Japan.<sup>154</sup> U.S. citrus and cherry growers have established ongoing market success based on substantial marketing investments.<sup>155</sup> These models offer lessons for future apple export efforts.

#### D. Domestic Competition

The snack approach might have been more successful if the Japanese domestic growers had not introduced their own small, less than perfect Fuji and Tsugaru apples that sold for prices similar to imported U.S. apples.<sup>156</sup> At the same time, a decrease in the value of the yen made the price of U.S. apples higher than projected.<sup>157</sup> U.S. apples were less able to compete on price with the smaller, imperfect and low priced Japanese apples that had previously gone to processing.<sup>158</sup>

Although Japanese apple industry and Government officials claim there was no coordinated effort to counter-market the smaller Japanese

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<sup>151</sup> DiBenedetto, *supra* note 149.

<sup>152</sup> Matsukawa, *supra* note 27.

<sup>153</sup> Target Export Assistance/Market Promotion Program credits were annually granted to the WAC for export promotion by the Department of Agriculture. INTERNATIONAL TRADE COMMISSION INDUSTRY & TRADE SUMMARY OF CERTAIN FRESH DECIDUOUS FRUITS *supra* note 21, at 21.

<sup>154</sup> Dunne, *supra* note 10.

<sup>155</sup> Teresa Watanabe, *Sunkist Squeezing Out Higher Sales in Japan*, L.A. TIMES, Mar. 25, 1991, at D3.

<sup>156</sup> Mizui, *supra* note 38; Holloway, *supra* note 5; Evans, *supra* note 5.

<sup>157</sup> Craig Foreman, *Well, How Do You Like Them Apples? They'll Cost You*, WALL ST. J., Jan. 13, 1995, at A10.

<sup>158</sup> Wilhelm, *supra* note 45. U.S. producers now hold nearly 40 percent of the processed fruit and juice concentrate market in Japan. Americans' success exporting processed apple juice concentrate to Japan displaced the smaller, imperfect Japanese apples from their traditional market and created competition for U.S. fresh apple exports. U.S. Dep't Agri., *Japan's Imported Fruit Juice Market Thrives: Industry Overview*, AGEXPORTER, Apr. 1996, at 4. However, a large portion of processed apple product exports from the U.S. to Japan is from Japanese owned processors. Dan Wheat, *Glico Must Tighten its Belt*, WENATCHEE WORLD, Mar. 21, 1997, at A4.

apples against U.S. imports, the smaller Japanese apples were available in large quantities and had not been sold as fresh apples before 1995.<sup>159</sup> In one sense, the Japanese consumer did benefit temporarily from the competitive effect of apple imports, even if the U.S. apple growers did not.<sup>160</sup>

## V. APPLES V. ORANGES

The regulations for the import of citrus fruit into Japan are similar to apple regulations in that separate processing and pest treatment are required, however, there is no regulatory separation of oranges by variety.<sup>161</sup> The introduction of U.S. citrus fruit also went through multiple diplomatic agreements and false starts.<sup>162</sup> In 1978, Japan and the U.S. agreed to a compromise import agreement allowing only "seasonal citrus," allowing imports while protecting Japanese domestic citrus growers.<sup>163</sup>

The compromise citrus agreement quickly fell into dispute over contrasting interpretations of quotas and timelines for increasing U.S. citrus exports.<sup>164</sup> Japanese farmers also publicly protested the introduction of imported citrus.<sup>165</sup> The American side threatened Section 301 sanctions, GATT action, and retaliatory exclusion of Japanese automobiles.<sup>166</sup>

Citrus promoters made substantial, long-term marketing investments in contrast to apple marketing.<sup>167</sup> The Florida and California Orange grower associations, and Sunkist in particular, spent millions of dollars on initial marketing and product development campaigns after entering the Japanese market under limited volume quotas, and were later able to take a strong market position when restrictions were reduced.<sup>168</sup> U.S. citrus fruit exports now dominate the citrus market in Japan.<sup>169</sup>

The long-term continuing success of U.S. citrus after initial regulatory friction indicates the value of building consumer relations by

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<sup>159</sup> Wudunn, *supra* note 18.

<sup>160</sup> 1997 Japan Annual Fresh Deciduous Fruit Report, *supra* note 18; *Japanese Imports of U.S. Apples Fall to One-Tenth of Previous Season's Total*, *supra* note 50.

<sup>161</sup> 1998 Marketing Plan, *supra* note 128; see generally, *Overview and GATT Panel Report on the U.S.-Japan Beef and Citrus settlement*, 27 I.L.M. 1548 (1988).

<sup>162</sup> Dunne, *supra* note 10.

<sup>163</sup> Reich et al., *supra* note 11, at 173.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 175.

<sup>166</sup> *Id.*; for a discussion of Section 301 see *supra* Section VII A.

<sup>167</sup> Watanabe, *supra* note 155.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; 1996 Japan Report, *supra* note 39.

maintaining market presence, even if it is a limited presence because of regulatory restrictions. U.S. apple importers have now damaged the image of their product by sending lower quality apples and abruptly pulling out of the market.<sup>170</sup> In contrast, New Zealand has taken an inside approach, advertising nationwide and persevering through initial rejection of Red Delicious apples and adapting to consumer preferences.<sup>171</sup> Citrus is not the only example of successful perseverance in Japan.

## VI. APPLES V. CHERRIES

U.S. cherries, primarily from the Pacific Northwest, have enjoyed twenty years of successful export to Japan, with sales of over US \$100 million each year.<sup>172</sup> These exports are regulated under the same regulatory language used for apples.<sup>173</sup> The import protocol required by MAFF for cherries is similar to the apple protocol, including initial MAFF on-sight inspection of cherries, fumigation, and variety specific documentation.<sup>174</sup> The required data on cherry processing is nearly as detailed as apple testing including 30,000 total tests.<sup>175</sup> However, the triple inspection of apples each season is, more invasive and expensive than cherry inspections.<sup>176</sup> Unlike the apple growers, cherry growers have begrudgingly continued to comply with MAFF variety specific requests and added varieties until almost all major varieties of U.S. cherries were eligible for export to Japan.<sup>177</sup>

The examples of successful citrus and cherry imports indicate that cumbersome regulation alone is not impeding sales of fruit in Japan, and

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<sup>170</sup> Red and Golden Delicious apples are known for low cost and long shelf life, not for quality of flavor. Therefore, new varieties such as Fuji are being widely planted and sold in Washington State and elsewhere in the U.S. Rick Steigmeyer, *Quality Crusade Caps Fruitful 7 Decades in Apple Industry: Auvil Has Led the Way Among State's Growers*, SEATTLE TIMES, Apr. 18, 1998, at C1.

<sup>171</sup> Isaka, *supra* note 51.

<sup>172</sup> 1996 Japan Report, *supra* note 39; JAPAN TARIFF ASSOCIATION, *supra* note 43 (Commodity No. 0809.20-000).

<sup>173</sup> The regulation for cherries reads: "Imported Garnet, Tulare, Bing, Brooks, Lambart, and Rainier varieties of cherries originating in the United States of America without passing through any other territory in conformity with the standards and approved by the Minister [are allowed]." Plant Epidemic Prevention Law, Law No. 151 of 1951, Attachment 19 to Table 2.

<sup>174</sup> Matsukawa, *supra* note 27, at 35. Ironically, many of the cherry growers involved in the extended negotiations with MAFF in 1978 for cherries also grow apples. *Id.* The cherry growers, while generally successful, also object to the difficult process of adding new varieties.

<sup>175</sup> *Id.*

<sup>176</sup> Bryant, *supra* note 137.

<sup>177</sup> *Id.*; Matsukawa, *supra* note 27, at 35-37.

that with persistence and consumer acceptance the current regulations do permit importation. Even the successful cherry exporters are seeking less restrictive processes to add new varieties, but have continued to sell in Japan while working for change.<sup>178</sup>

## VII. REEMERGENCE OF THE APPLE DISPUTE

The failure of U.S. apple sales after 1996 ignited new complaints against Japan and opened a new chapter in the apple dispute.<sup>179</sup> U.S. officials argued that the Apple Agreement should include other varieties such as Gala, Fuji, Braeburn, Granny Smith and Jonagold in the Red and Golden Delicious protocol already in place.<sup>180</sup> MAFF rejected that position, noting that data cannot be applied to other varieties indiscriminately.<sup>181</sup> The U.S. contends that MAFF is inhibiting apple imports by requiring lengthy and redundant testing on each new variety to be introduced.<sup>182</sup> Testing for the Red and Golden Delicious varieties took seven years to satisfy MAFF, and the Washington apple growers and scientists insist that codling moth treatment is in no way affected by variety of apple.<sup>183</sup> MAFF in turn contends that other varieties are welcome if the tests show that the treatment process is effective.<sup>184</sup>

MAFF requirements include: inspections, separate growing areas, separate processing, and additional fumigation of apples to be sent to Japan. All of these requirements are at the exporting growers' expense.<sup>185</sup> U.S. growers initially understood and agreed with the Japanese desire to

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<sup>178</sup> Shorrock, *supra* note 1; Bryant, *supra* note 137.

<sup>179</sup> Shorrock, *supra* note 1.

<sup>180</sup> Toshio Aritake, *U.S.-Japan Apple Talks Fail: U.S. May Appeal to WTO*, Int'l Trade Daily (BNA), Mar. 11, 1997.

<sup>181</sup> *Japan, U.S. Remain Opposite on Apple Quarantine*, *supra* note 1; *Farm Minister Defends Testing of U.S. Apple Imports*, JAPAN WEEKLY MONITOR, Oct. 14, 1996.

<sup>182</sup> USTR Ambassador Ira Shapiro is quoted as saying, "We have broken through after 23 years of getting U.S. apples into Japan only to discover that then there were requirements being put on a variety-by-variety basis which were inhibiting our exports." *Shapiro Reiterates WTO Action on Apples*, Jiji Press Ticker Service, Mar. 6, 1997.

<sup>183</sup> Evans, *supra* note 5; Matsukawa, *supra* note 27, at 36-38.

<sup>184</sup> John Zarocostas, *Japan-US Apple Talks Still Bearing No Fruit*, J. COM., June 9, 1997, at 2A.

<sup>185</sup> The fumigation process requires the use of methyl bromide, a harsh but effective fumigation agent that will be banned in the United States after 2001 under the Clean Air Act. 40 CFR § 82 (1990); Protection of Stratospheric Ozone, 63 Fed. Reg. 9151 (1998). Therefore, after 2001, it will become impossible for U.S. growers to comply with the current protocol. Patricia B. Demetrio, *Unfair to U.S. Farms*, J. COM., Oct. 21, 1997, at 1B; Holloway, *supra* note 5; Evans, *supra* note 5. *Cf. Japan, EU Agree on Quarantine Rules for Agricultural Produce*, *supra* note 53 (discussing Japan's agreement to split the quarantine costs of additional inspections with EU exporters due to environmental compliance).

avoid disease and pests, but now the growers object to the Japanese position that the same procedures must be separately tested and confirmed on each variety.<sup>186</sup> According to U.S. apple industry officials, the variety of the apple does not alter the effect of the external disease and pest control measures, so variety specific testing is not scientifically valid.<sup>187</sup> There is also evidence that a strain of fire blight may already exist in Japan, thus negating the reason for the multiple inspection and separate growing areas for U.S. apples.<sup>188</sup> Japanese officials strongly deny that fire blight exists in Japan.<sup>189</sup>

After failing to gain MAFF inclusion for other varieties under the Apple Agreement, the U.S. took unilateral action to attack Japan's apple import requirements with a Section 301 investigation and filed an eventually successful complaint with the World Trade Organization ("WTO").<sup>190</sup> Since then, direct U.S.-Japan trade talks have faltered.<sup>191</sup> Although Red and Golden Delicious apples are approved, MAFF will not apply the data or fumigation processes used in the initial approval for different varieties from the U.S. and insists that each variety must be tested separately.<sup>192</sup> This variety specific testing requirement was the basic issue of the parallel domestic Section 301 investigation and WTO dispute.<sup>193</sup>

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<sup>186</sup> Interview with Prof. Dan F. Henderson, Japanese Law Scholar, and Washington State apple grower, in Seattle Wash. (Jan. 5, 1998).

<sup>187</sup> According to Hugh W. Ewart, Vice-President of the Northwest Horticulture Council, "The science is very strong in saying there doesn't need to be additional testing." DiBenedetto, *supra* note 2.

<sup>188</sup> A controversial Japanese researcher, Akio Tanii, committed suicide after being criticized for publishing research on a disease similar to fire blight (*Erwinia amylovora*) in Japan. Leslie Helm & Gale Eisenstodt, *Japanese Researcher's Suicide Leads to Claims of a Cover-Up*, SEATTLE TIMES, June 23, 1996, at F1. The Japanese government insists that the precautions are necessary and that the Japanese fire blight is an isolated, less harmful strain not affecting apples.

<sup>189</sup> Hidemi Taguchi, *Japan: 'Cover-Up' Article Paints Misleading Picture of Japan*, SEATTLE TIMES, Aug. 30, 1996, at B7 (expressing the Seattle Consular General of Japan's disagreement with the Helm & Eisenstodt article; referring to the Japanese infection as "shoot blight of pear;" following verbatim with letters which appeared in many newspapers across America signed by various Consular Generals.). Cornell University researcher Steven Beer, who worked with Tanii, states that the disease is in fact a strain of fire blight. Holloway, *supra* note 5.

<sup>190</sup> Initiation of Section 302 Investigation and Request for Public Comment: Japan Market Access Barriers to Agriculture Products, 62 Fed. Reg. 53,853, Oct. 16, 1997; WTO Dispute Settlement Proceeding Regarding Varietal Testing and Quarantine Requirements, 62 Fed. Reg. 53,378, Oct. 14, 1997; *Japan Market Access Barriers to Agricultural Products*, WTO Dispute No. 301-112 released Oct. 27, 1998, Complaint by the United States WT/DS76R [hereinafter Panel Decision]; *affirmed by Japan—Measures Affecting Agricultural Products WT/DS76/AB/R*, Feb. 22, 1999, [hereinafter Appellate Decision].

<sup>191</sup> Zarocostas, *supra* note 184.

<sup>192</sup> *Id.*

<sup>193</sup> Ono, *supra* note 28. USTR has requested public comment on the issue of Japan's variety specific testing requirements as part of the Super 301 investigation and the WTO claim. WTO Dispute Settlement Proceeding Regarding Varietal Testing and Quarantine Requirements, 62 Fed. Reg. 53,378, Oct. 14, 1997.

### A. Section 301

The United States initiated a formal investigation of Japan's apple import regulations in October of 1997 under "Section 301" review.<sup>194</sup> Every major trade negotiation leading to successful market entry for U.S. goods or services into Japan since 1974 has involved a 301 investigation.<sup>195</sup> The escalation to 301 threats is similar to the pattern of negotiation the U.S. followed in the 1980s, which led to successful citrus exports to Japan.<sup>196</sup> In the citrus dispute, the United States threatened to deny the entrance of Japanese automobiles and other goods into the United States under Section 301 if import limits on U.S. oranges and other citrus products were not removed.<sup>197</sup> Section 301 is therefore recognized as an effective means for promoting U.S. trade interests.<sup>198</sup> In fact, President Clinton reinstated the expiring Section 301 statutory authority while conducting contentious trade talks, including the apple issue, with Japan in 1994.<sup>199</sup>

### B. Apple Dispute Goes to the WTO

The United States also challenged Japan's apple import requirements in the WTO beginning in April of 1997.<sup>200</sup> The WTO decided strongly in

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<sup>194</sup> *Report To Congress on Section 301 Developments (June 1996-January 1998)*, USTR Home Page (Nov. 1, 1998) <<http://www.ustr.gov/reports/301report/sec301.pdf>>. Section 301 of the Trade Act of 1974 authorizes and, in some cases, requires the United States to impose trade sanctions against countries with unfair trade practices. Trade Act of 1974, 19 U.S.C. § 2411(a) (1996). Section 301 gives the President authority to retaliate against foreign nations with unfair trade practices as determined by the United States Trade Representative as "unjustifiable, unreasonable, or discriminatory" conduct which burdens the United States. *Id.* at §2411(a)(1); see generally Judith Hippler Bello & Alan F. Holmer, *Section 301 of the Trade Act of 1974: Requirements, Procedures, and Developments*, 7 J. INT'L BUS. L. 633 (1986). The unilateral use of Section 301 by the United States is contrary to the basic spirit and letter of international trade agreements such as the WTO, but the United States has refused to abandon the policy in spite of criticism from trading partners. Judith H. Bello & Allan F. Holmer, *The Post-Uruguay Round Future of Section 301*, 25 LAW & POL'Y INT'L BUS. 1297, 1305 (1994).

<sup>195</sup> Grier, *supra* note 72.

<sup>196</sup> Reich et al., *supra* note 11, at 153.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> The timing of Section 301 reinstatement was widely considered a show of force against Japan. *Clinton Renews Super 301 Measure*, 11 INT'L TRADE REP. 363, 367 (1994); Juan P. Morillo, *Office of the U.S. Trade Representative: U.S.-Japanese Trade Dispute*, 25 LAW & POL'Y INT'L BUS. 1205, 1211 (1994).

<sup>200</sup> Panel Decision *supra* note 190; *Japan Refutes U.S. Complaint on Apple Testing*, *supra* note 1; Wilhelm, *supra* note 45. The World Trade Organization, which has 119 nation members was established on April 15, 1994 as a successor organization to the General Agreement on Tariffs & Trade (GATT). Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—

favor of the United States, and found Japan's variety specific testing requirements in violation of WTO standards.<sup>201</sup> Japan appealed the panel decision, but appeals are limited to issues of law covered in the Panel report and legal interpretations developed by the Panel, and no errors were found.<sup>202</sup> The question presented was whether phytosanitary<sup>203</sup> testing and fumigation data from Red and Golden Delicious apples can be applied to different U.S. varieties treated by the same process.<sup>204</sup> WTO member nations are required to avoid arbitrary or unjustified distinctions and cannot use phytosanitary measures as trade barriers.<sup>205</sup> The Panel decision against Japan was consistent with prior WTO and GATT decisions. Before the Panel decision, most observers concluded that the variety specific testing requirements had moved beyond the semi-legitimate realm of health interests into strict protectionism.<sup>206</sup> However, this favorable WTO ruling will not solve the apple dispute.

## VIII. CONCLUSION

While Japan's discretionary apple import regulations contributed indirectly to the commercial failure of U.S. apple exports to Japan, Japanese

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RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1140 (1994). In the Agreement on the Application of Sanitary and Phytosanitary Measures, the WTO recognizes the right of member nations to impose scientifically based phytosanitary requirements on agricultural imports to protect human, animal or plant health from pests, disease and toxins. AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES, 33 I.L.M. 1125; (1994), Appendix IC GATT Doc. No. MTN/FA, 33 I.L.M. 1125; (1994) [hereinafter SPM Agreement].

<sup>201</sup> Panel Decision *supra* note 190.

<sup>202</sup> *Ruling May Help U.S. Sell Apples in Japan*, SEATTLE TIMES, Oct. 28, 1998, at E4; see also *Dispute Settlement Understanding* art. 16 WTO Home Page (visited Nov. 1, 1998) <<http://www.wto.org/wto/dispute/dsu.htm>>.

<sup>203</sup> "Phytosanitary" literally means plant (phyto) health (sani), from Greek referring to issues of plant disease.

<sup>204</sup> Zarocostas, *supra* note 184.

<sup>205</sup> SPM Agreement, *supra* note 200, art. 2, at 2, 3. The SPM Agreement also requires WTO members to assess the risks of harm prevented by phytosanitary measures and balance those risks with the WTO desire for standards that do not unnecessarily restrict trade. SPM Agreement, *supra* note 200 art. 4, at 2. See also GENERAL AGREEMENT ON TARIFFS AND TRADE MULTILATERAL NEGOTIATIONS: AGREEMENT ON TECHNICAL BARRIERS TO TRADE-STANDARDS CODE, 18 I.L.M. 1079; 31 U.S.T. 405 (1979). One purpose of the 1994 WTO reorganization was to increase scientific discipline on the application of phytosanitary measures. *Id.* art. 1. SPM regulations in WTO member states should be easily identifiable, clear, transparent, and available upon request subject to claims by other member states for WTO review. SPM Agreement, art 7, Annex B at 3.

<sup>206</sup> Arthur Alexander, a trade analyst with the Japanese government-funded think tank Japan Economic Institute states: "[MAFF officials] have probably pushed those legitimate [sanitary] interests into strict protectionism." Shorrock, *supra* note 1, at 9A.

consumer rejection of Red and Golden Delicious apples was the ultimate cause. U.S. efforts to further liberalize Japan's apple import restrictions will primarily benefit apple exporters who have maintained a market presence in Japan in spite of the regulatory barriers. By abandoning the market, U.S. apple growers have damaged their chances for future success. If U.S. apple growers attempt to export to Japan again, the issues of domestic and other import competition, consumer preferences, market development, and now, less favorable exchange rates must be resolved. The WTO decision in favor of the U.S. alone will be fruitless unless these other problems are addressed.